Lah Ah Chai v Chong Mee Ling

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S8–33–1012 OF 2002
FAIZA TAMBY CHIK J
14 JULY 2004

Family Law — Divorce — Decree nisi granted — Whether decree nisi can be varied — Variation concerning distribution of matrimonial property — Whether decree nisi final order — Law Reform (Marriage And Divorce) Act 1976 s 83

Family Law — Matrimonial property — Division of property — Property acquired before decree nisi absolute — Whether husband made full and frank disclosure — Whether wife has knowledge — Whether wife's rights had been deprived

The petitioner–wife applied for an order to vary the Decree Nisi dated 16September 2002 ('the said Decree Nisi') with respect to the distribution of the matrimonial assets and for the petitioner–husband to make full and frank disclosure of all his properties and/or assets acquired by the petitioner–husband during the course of the marriage and before the said Decree Nisi was made absolute by the court on 16 October 2002. Her grounds for the application were: (i) the petitioner–husband failed to make full and frank disclosure in the joint petition of all the assets procured by the petitioner–husband during the course of the marriage and before the said Decree Nisi was made absolute and/or had willfully concealed the true facts to induce the petitioner–wife to agree to the terms of the division of matrimonial properties in the joint petition; and/or (ii) that there was a misrepresentation by the petitioner–husband which has deprived her of her rights; and (iii) that there has been a material change in the circumstances of the case.

Held, dismissing the application with costs:

(1) The petitioner–wife was estopped from applying for a variation of the said Decree Nisi as it was a final order (see para 3).

(2) The power of the court to vary the said Decree Nisi is only limited to variation order for custody and maintenance under s 83 of the Law Reform (Marriage and Divorce) Act 1976. The said section does not provide for the variation of the order pertaining to the distribution of the matrimonial assets (see para 4). Therefore, the appropriate proceedings to be initiated by the petitioner–wife is to set aside the said Decree Nisi or to appeal against the said Decree Nisi and not to file summons-in-chambers to apply for leave to vary the said Decree Nisi (see para 8).

(3) On the facts, the petitioner–husband could not be said to have knowingly and or deliberately failed to make full and frank disclosure and he did not willfully conceal the true facts to induce the petitioner–wife to agree

to the terms of the division of the matrimonial properties in the joint petition (see para 8). Thus, the petitioner–wife's allegations pertaining to the misrepresentation by the petitioner–husband were not reasonable nor were they substantiated by any cogent proof but were merely pure baseless assertions (see para 9).

(4) The petitioner–wife's rights have not been compromised nor prejudiced as the petitioner–husband had made full and frank disclosure. Moreover, on the facts, she was at all material times fully aware of the purchase of the third property and had no intention to exercise her rights thereto during the joint petition as the third property was the only permanent place of residence for the petitioner–husband to stay upon completion of the divorce proceedings. Therefore, it was unreasonable for the petitioner–wife to claim against the third property as she had already been provided with permanent place of residence to stay, ie the matrimonial home (see para 10).

[**Bahasa Malaysia summary**

Pempetisyen–isteri memohon untuk satu perintah untuk mengubah dekri nisi bertarikh 6 September 2002 ('Dekri Nisi tersebut') yang berhubung dengan pembahagian harta-harta suami isteri dan untuk pempetisyen–suami membuat pendedahan yang penuh dan tulus berhubung dengan kesemua harta-hartanya dan/atau aset-aset yang diperolehnya semasa tempoh perkahwinan dan sebelum Dekri Nisi menjadi mutlak pada 16 Oktober 2002. Alasan untuk permohonan tersebut adalah seperti berikut: (i) bahawa pempetisyen–suami gagal membuat pendedahan yang penuh dan tulus di dalam petisyen bersama berkenaan dengan kesemua aset yang diperoleh oleh pempetisyen–suami semasa tempoh perkahwinan dan sebelum Dekri Nisi tersebut menjadi mutlak dan/atau telah secara sengaja menyembunyikan fakta sebenar yang menyebabkan pempetisyen–isteri bersetuju dengan terma-terma pembahagian harta-harta suami-isteri di dalam petisyen bersama itu; dan/atau (ii) terdapat salah nyata oleh pempetisyen-suami yang menyebabkan si pempetisyen–isteri kehilangan haknya; dan (iii) terdapat perubahan keadaan yang material di dalam kes ini.

Diputuskan, menolak permohonan dengan kos:

(1) Pempetisyen–isteri diestop dari memohon untuk mengubah Dekri Nisi tersebut kerana ianya adalah satu perintah muktamad (lihat perenggan 3).

(2) Kuasa mahkamah untuk mengubah Dekri Nisi tersebut adalah terhad kepada perintah mengubah penjagaan dan nafkah di bawah s 83 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976. Seksyen tersebut tidak memperuntukkan perintah untuk mengubah pembahagian harta-harta suami-isteri (lihat perenggan 4). Oleh yang demikian, prosiding yang wajar untuk dimulakan oleh pempetisyen–isteri adalah untuk

mengetepikan Dekri Nisi tersebut atau merayu terhadap Dekri Nisi tersebut dan bukan memfailkan saman dalam kamar untuk memohon kebenaran mengubah Dekri Nisi tersebut (lihat perenggan 8).

(3) Pada fakta, pempetisyen–suami tidak boleh dikatakan telah secara sengaja gagal membuat pendedahan yang penuh dan tulus dan beliau bukan secara sengaja menyembunyikan fakta sebenar yang menyebabkan pempetisyen–isteri bersetuju dengan terma-terma pembahagian harta suami isteri di dalam petisyen bersama itu (lihat perenggan 8). Dari itu, dakwaan pempetisyen-isteri mengenai salah nyata si pempetisyen–suami adalah tidak wajar ataupun ianya tidak disokong oleh bukti-bukti yang kukuh tetapi hanyalah dakwaan semata (lihat perenggan 9).

(4) Hak-hak pempetisyen–isteri tidak di kompromi atau diprejudiskan kerana pempetisyen–suami telah membuat pendedahan yang penuh dan tulus. Selanjutnya, pada fakta, beliau pada kesemua masa yang material mengetahui tentang pembelian hartanah ketiga dan tidak mempunyai niat untuk menggunakan haknya semasa petisyen bersama kerana hartanah ketiga itulah satu-satunya tempat kediaman kekal pempetisyen–suami selepas prosiding cerai. Maka, adalah tidak wajar bagi pempetisyen–isteri untuk menuntut hartanah ketiga kerana beliau telah diberikan satu tempat kediaman kekal iaitu kediaman suami isteri (lihat perenggan 10).]

Notes

For cases on division of property, see 7(2) *Mallal's Digest* (4 th Ed, 2003 Reissue) paras 3322–3413.

For cases on divorce proceedings generally, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2725–2937.

For division of matrimonial property, see 8 *Halsbury's Laws of Malaysia* (2003 Reissue) paras [140.395]–[140.397].

Cases referred to

Carson v Carson [1983] 1 All ER 478 (refd)
Minton v Minton [1979] 1 All ER 79 (refd)
Robinson v Robinson [1982] 2 All ER 699 (refd)
Soo Lina v Ngu Chu Chiong (Chong Oi Khium Irene, Co-respondent) [1992] 2 MLJ 870 (refd)
Tommey v Tommey [1982] 3 All ER 385 (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 s 83

Low Beng Choo (Joanne Ng with her) (Low Beng Choo & Assoc) for the petitioner–husband.
SC Lim (SC Lim & Partners) for the petitioner–wife.

Faiza Tamby Chik J:

[1] A joint divorce petition was filed in court (exh CML–1 of encl 22) wherein it was agreed, *inter alia* that a division of matrimonial property be made, as follows:

(i) One–half (l/2) undivided share of the property with the postal address at No 115, Jalan Datuk Sulaiman 4, Taman Tun Dr Ismail, 60000 Kuala Lumpur (hereinafter referred to as 'the first property') shall be transferred to the petitioner–wife by the petitioner–husband (the other one–half (1/2) share was already owned by the petitioner–wife);

(ii) One–half (1/2) undivided share in the property known as No 12A, Jalan PJU 3/41, Section 12, Sunway Damansara Industrial Park, Selangor Darul Ehsan (hereinafter referred to as 'the second property') shall be transferred to the petitioner–husband by the petitioner–wife (the other one–half (1/2) share was already owned by the petitioner–husband);

(iii) The court by order dated 16 September 2002 granted order in terms of the joint petition and ordered *inter alia*, the division of matrimonial property as per the terms set out in the joint petition.

[2] In her summons in chambers in encl 21 the petitioner–wife wishes to pray for an order to vary the decree nisi dated 16 September 2002 ('the said Decree Nisi') with respect to the distribution of the matrimonial assets and for the petitioner–husband to make full and frank disclosure of all his properties and or asets acquired by petitioner–husband during the course of the marriage and before the said Decree Nisi was made absolute by the court on 16 October 2002. Her grounds to support the application for the variation of the said Decree Nisi are as follows:

(a) that the petitioner–husband failed to make full and frank disclosure in the joint petition dated 30 August 2002 of all the assets procured by the petitioner–husband during the course of the marriage and before the said Decree Nisi was made absolute by the court on 16 October 2002 and or had willfully concealed the true facts to induce the petitioner–wife to agree to the terms of the division of matrimonial properties in the joint petition; and/or

(b) that there was a misrepresentation by the petitioner–husband which has deprived the petitioner–wife her rights; and/or

(c) that there has been a material change in the circumstances of this case in that the petitioner–wife has been denied her rightful claim to the asset held under PN 4816, Lot 40, Section 7, Town of Petaling Jaya, District of Petaling, State of Selangor Darul Ehsan together with the building erected thereon and known as No 2, Jalan 7/16, Section 7, 46200 Petaling Jaya, Selangor Darul Ehsan ('the said third property').

[3] On perusal of all documents submitted in this case, I am of the view that the petitioner–husband has made full and frank disclosure to the petitioner–wife prior to the joint petition dated 30 August 2002 of all the assets procured by the petitioner–husband during the course of the marriage and before the said Decree Nisi was made absolute by this court on 16 October 2002 and that all the terms as stated in the joint petition were mutually agreed upon by both the petitioner–husband and petitioner–wife before the said joint petition was executed on 30 August 2002. The said Decree Nisi pertaining to the distribution of the matrimonial assets which was granted by this court is a final order. Therefore, the petitioner–wife is estopped from applying for a variation of the said Decree Nisi. In the case of *Minton v Minton* [1979] 1 All ER 79, Lord Scarman has stated the following at pp 87 and 88:

> But the other, of equal importance, is the principle of 'the clean break'. The law now encourages spouses to avoid bitterness after family breakdown and to settle their money and property problems. An object of the modern law is to encourage the parties to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down. It would be inconsistent with this principle of the court could not make, as between the spouses, a genuinely final order unless it was prepared to dismiss the application. The present case is a good illustration. The court having made an order giving effect to a comprehensive settlement of all financial and property issues as between spouses, it would be a strange application of the principle of the clean break if, notwithstanding the order, the court could make a future order on a subsequent application made by the wife after the husband had complied with all his obligations.

[4] The power of this court to vary the said Decree Nisi is only limited to variation order for custody and maintenance, which said powers are provided under s 83 of the Law Reform (Marriage and Divorce) Act 1976 (Act 164). Section 83 only grants the power to this court to vary an order for maintenance and custody provided the court is satisfied that the order granted was based on misrepresentation or mistake of fact or if there has been any material change in the circumstances. The said section does not provide for the variation of the order pertaining to the distribution of the matrimonial assets. In the case of *Soo Lina v Ngu Chu Chiong (Chong Oi Khium Irene, Co-respondent)* [1992] 2 MLJ 870, Haidar J (as he then was) said at p 871:

> (3) A consent order is a final order. …Section 83 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') empowers the court at any time and from time to time to vary or rescind any subsisting order for maintenance where it is satisfied that the order was based on any misrepresentation of fact or where there has been any material change in the circumstances. Going by the meaning of the term 'variation order' in the Divorce and Matrimonial Proceeding Rules 1980, the petitioner in this case could apply by way of notice of application for ancillary relief to vary only the order in respect of maintenance made in the earlier divorce proceedings.
>
> (4) When a property adjustment order is made, be it in a judicial separation or divorce proceedings, s 76(1) of the Act is intended to make such an order

final. The Act would appear to confine the power of the court to vary an order in respect of maintenance for the petitioner or the child.

[5] Reference was made to the following English authorities by the court, ie

(i) *Robinson v Robinson* [1982] 2 All ER 699

A distinction has to be drawn between the restrictions imposed by the Matrimonial Causes Act 1973 on varying lump sum orders or property adjustment orders which cannot be varied, and the power to set aside an order which has been obtained by fraud or mistake, or by material non-disclosure. The essence of the distinction is that the power to vary usually reflects changes of circumstances subsequent to the date of the order, whereas the power to set aside arises when there has been fraud, mistake or material non-disclosure as to the facts at the time the order was made. From the point of view of convenience, there is a lot to be said for proceedings of this kind taking place before a judge at first instance, because there will usually be serious and often issues of fact to be determined before the power to set aside can be exercised.

(ii) *Carson v Carson* [1983] 1 All ER 478

… it is not necessary in this judgment to consider what the position might have been if some other capital asset was involved … s 31 of the 1973 Act, which make it clear that the court has no power to vary a property adjustment order in any circumstances.

[6] And in para B and C, p 877, the said court concluded that:

…. There is no similar express provision in our divorce legislation as s 31 of the English Act which oust the power of the court to vary a property adjustment order. At the same time, there is no statutory provision in respect of variation for a property adjustment order in our divorce legislation. In the circumstances, I am of the opinion that when a property adjustment order is made, be it in a judicial separation or divorce proceedings, s 76(1) of the Act is intended to make such an order final. The Act would appear to confine the power of the court to vary an order in respect of maintenance for the petitioner or the child…

[7] In *Chin Ah Chai John v Hee Ee Chu & Anor* (Divorce Petition No. 2378/91), High Court Singapore (Chao Hick Jin) 22 February 1994, p 447 of *Mallal's Digest* (4th Edition (2003)) (Reissue) stated:

(2) … an order for the division of matrimonial assets is quite different from an order for the payment of periodic maintenance. Whereas an order for periodic maintenance may be varied, if there is a material change in circumstances (s 112), the same is not so for division of matrimonial assets. Such an order once made is final, subject only to appeal by the dissatisfied party. There is no power or jurisdiction in the High Court to vary it;

(3) the only circumstance where an order for the division of matrimonial assets may conceivably be varied is that if before the order is perfected a party who is dissatisfied with it has requested for further arguments before the same judge and the judge has acceded to the request. If no such request is made and the order is perfected, the only recourse is by way of an appeal. Here, not only

has the order been perfected, it has also been carried out. Therefore, an application by way of summons-in-chambers is not the correct procedure for getting such an order reviewed.

[8] I think the appropriate proceedings to be initiated by the petitioner-wife is to set aside the said Decree Nisi or to appeal against the said Decree Nisi and not to file summons-in-chambers to apply for leave to vary the said Decree Nisi. As I said earlier the petitioner–husband has made full and frank disclosure to the petitioner–wife pertaining to all the assets procured by the petitioner–husband during the course of the marriage and before the Decree Nisi was made absolute by the court on 16 October 2002. The petitioner–husband did not conceal any matrimonial assets from the petitioner–wife. It is observed that the petitioner–husband had purchased the third property after the separation between the petitioner–husband and the petitioner–wife. At the time of the purchase of the third property, the petitioner–wife had access and authority to manage the finances of both the family and the petitioner–husband's company, and as such, the petitioner–wife was fully aware that the petitioner–husband has used monies to pay for part of the purchase price for the third property. The petitioner–husband had informed the petitioner–wife and the petitioner–wife was fully aware of the purchase of the third property on or sometime in May 2002 as he needed a permanent place of residence to stay after he had to move out from the matrimonial home. As admitted by the petitioner–wife in para 8 of encl 24, the petitioner–wife was fully aware that the petitioner–husband rented an apartment at Puncak Prima, Sri Hartamas as a temporary residence together with other tenant and petitioner–husband had brought the children to the said apartment. The petitioner–husband was aware that it is neither convenient nor practical for the children to stay over with him by having to share the apartment with the other tenant in the said apartment. The petitioner–husband was merely occupying a room (approximately 8' x 12') in the said apartment. The renting of the said apartment was only a temporary measure pending the completion of the renovation works to the third property. When the renovation works were completed, the petitioner–husband took the children to the third property in good faith and as the petitioner–wife was fully aware of the circumstances of the petitioner–husband's purchase. In the circumstances, the petitioner–husband cannot be said to have knowingly and or deliberately failed to make full and frank disclosure and he did not willfully conceal the true facts to induce the petitioner–wife to agree to the terms of the division of the matrimonial properties in the joint petition.

[9] The petitioner–wife submitted that prior to the filing of the joint petition, on or about 21 August 2002, the solicitors for the petitioner–wife issued a letter to the solicitors for the petitioner–husband (exh CML–5 of encl 22) placing on record *inter alia*, all properties and/or assets known to the petitioner–wife which were acquired during the course of the marriage. In the same letter, it was confirmed by the petitioner–wife that she would forego her entitlement to only those properties listed in the said letter save as the first

property. The petitioner–wife submitted that no reply was issued with respect to the letter at exh CML–5 of encl 22. It is noted that the petitioner–husband had taken the letter dated 21 August 2002 by the petitioner–wife's solicitors in good faith as the petitioner–husband verily believed in good faith that it was a tacit agreement that the third property was purchased, with the full knowledge of the petitioner–wife, was to be the one and only place of permanent residence for the petitioner–husband to stay after he had to move out from the matrimonial home and after completion of the divorce proceedings. Although the petitioner–wife did not list the third property in her solicitors' letter dated 21 August 2002 and in the joint petition, the petitioner–husband verily believe in good faith that the petitioner–wife did not intend to claim against the third property as it was the understanding between the petitioner–wife and the petitioner–husband that the third property would be excluded from the list as the petitioner–husband was to solely bear all the liabilities pertaining to the third property. I view that the petitioner–husband had acted in good faith to render the matrimonial home free from all charges and encumbrances before it was transferred to the petitioner–wife and the petitioner–husband will provide and continue to provide to the petitioner–wife upon the agreed terms as stated in the said Decree Nisi, in particular paras 9.1 to 9.8 of the said LAH affidavits. In the circumstances, I view the petitioner–wife's allegations pertaining to the misrepresentation by the petitioner–husband are not reasonable nor are they substantiated by any cogent proof but are merely pure baseless assertions. In the case of *Tommey v Tommey* [1982] 3 All ER 385, at p 385, Balcombe J held that:

> Unlike consent orders in other types of litigation which derived their force and effect from the parties' agreement, a consent order embodying financial arrangements between the parties to a divorce derived its legal effect from the order itself and not from the parties' agreement, and could not be impeached, after the pronouncement of a decree absolute, on the ground of undue influence in the way in which consent orders in other types of litigation could. A consent order in divorce proceedings could therefore only be invalidated on the same grounds as non-consensual matrimonial orders. Whether those grounds should be extended to include undue influence depended on balancing the need to provide a remedy for a wrong and protect a weaker spouse from exploitation by a stronger spouse against the need to encourage finality and certainty in matrimonial proceedings. Since it was the policy of the law to encourage a clean break after divorce, the balance was in favour of not extending the grounds for setting aside a non-consensual matrimonial order, and accordingly, even if the wife established undue influence, it would be a ground for setting aside the consent order.

[10] It is noted that as agreed in the terms of the joint divorce, the petitioner–husband has transferred to the petitioner–wife, one–half (1/2) of his share to the matrimonial home held under HS(D) 57454, PT No 2467, Mukim of Kuala Lumpur, District and State of Wilayah Persekutuan together with the two and a half storey terrace house erected thereon and known as No 116,

Jalan Datuk Sulaiman 4, Taman Tun Dr Ismail, 60000 Kuala Lumpur, free from encumbrances and charges, and the petitioner–husband had and is still continuing to pay the petitioner-wife a monthly maintenance sum of RM3,000 per month. It is seen that the petitioner–husband has performed his obligations in accordance with the terms as stated in the said Decree Nisi and will continue to perform the same accordingly and the petitioner-husband verily believes that till to date, the petitioner-wife is still enjoying the benefits of all the items as stated in paragraphs 9.1 to 9.8 of the said LAH Affidavits. The petitioner–wife's rights have not been comprised nor prejudiced as the petitioner–husband had made full and frank disclosure pertaining to all the assets procured by the petitioner–husband during the course of the marriage and before the said Decree Nisi was made absolute by the court on 16 October 2002. I think the petitioner–wife was at all material times fully aware of the purchase of the third property and had no intention to exercise her rights thereto during the joint petition as the third property is the one and only permanent place of residence for the petitioner–husband to stay after he moved out from the matrimonial home and upon completion of the divorce proceedings. It is noted that the purchase price of the third property is RM630,000 and is still under financing in the loan sum of RM450,000. The petitioner–husband is required to pay a sum of RM5,040.55 per month towards the monthly installment repayment therefore for a period of 11 years. Besides paying for the monthly installment for the third property, petitioner–husband is also required to pay for the monthly installment for the other seven properties as stated in the petitioner–wife's solicitors' letter dated 21 August 2002. I am of the opinion that it is not reasonable for the petitioner–wife to claim against the third property as the petitioner–wife is already provided with permanent place of residence to stay, ie the matrimonial home, which is free from encumbrances or charges together with a monthly maintenance of RM3,000 per month from the petitioner–husband.

[11] Therefore, based on the above stated grounds, the petitioner–wife's summons in chambers is hereby dismissed with costs.

Application dismissed.

Reported by Izzaty Izzuddin